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***EX PARTE***

*Electronic Filing via ECFS*

July 25, 2005

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-A325  
Washington, DC 20554

RE: WC Docket No. 04-223 *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*

Dear Ms. Dortch:

The attached memorandum, dated July 25, 2005, is being submitted for inclusion in the record of the above-captioned proceeding.

Pursuant to Section 1.1206 of the Commission's rules, this *ex parte* letter is being electronically filed with the Commission in accordance with Section 1.49(f) of those same rules. Please contact the undersigned at 202-429-3121 should you have any questions.

Sincerely,

/s/ Cronan O'Connell

Attachment

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## EX PARTE MEMORANDUM

**DATE:** July 25, 2005

**RE:** Qwest Corporation Petition for Forbearance — WC Docket  
No. 04-223

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The purpose of this memorandum is to examine several legal issues that have arisen regarding the Federal Communications Commission's ("Commission") consideration of Qwest Corporation's ("Qwest's") forbearance petition concerning the Omaha Metropolitan Statistical Area (or "Omaha MSA").<sup>1</sup>

It remains Qwest's position that Qwest is entitled to forbearance from incumbent local exchange carrier ("ILEC") and dominant carrier regulation in the Omaha MSA. Qwest is now the minority provider of local exchange service in Omaha, and it would be clearly arbitrary, capricious and unlawful for the Commission to continue to apply regulations to Qwest that are meant to apply to a company with substantial market power.

### **I. Grant of Qwest's forbearance petition will not prejudice existing carriers who interconnect with Qwest or use Qwest's facilities.**

The question has arisen whether other carriers might be prejudiced by forbearance from the statutory and regulatory provisions that are the subject of Qwest's petition. It must be remembered that Qwest is basically seeking forbearance from dominant carrier and ILEC regulation. It is not seeking relief from the normal rules applicable to other LECs (or local exchange carrier") under Section 251(b) or from the application of those rules under Section 251(c)(1). Nor is Qwest seeking forbearance from the normal non-dominant common carrier rules in Title II of the Act.

Finally, Qwest is not seeking to retract its pro-competitive offerings in those areas where it has been relieved from unbundling obligations in other contexts, such as the Qwest Platform Plus product or its tariffed offerings of high capacity loops and transport. Thus, the only

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<sup>1</sup> As referenced in this memorandum, the "Omaha MSA" includes the geographic areas of Omaha, Nebraska and Council Bluffs, Iowa. The relief requested in the Qwest forbearance petition would apply to the entire MSA that Qwest serves.

regulatory relief that Qwest is seeking is that which burdens it uniquely as an ILEC and a dominant carrier at a time when it is unreasonable to impose ILEC and dominant carrier rules on Qwest in Omaha. Some of the regulatory obligations that would remain in place include:

- Interconnection: the duty to interconnect directly or indirectly with the facilities and equipment of other carriers (Section 251(a)(1)).
- Network Compatibility: the duty not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 255 (access by persons with disabilities) or 256 (interconnection coordination) of the Act (Section 251(a)(2)).
- Good Faith Negotiation: the duty to negotiate interconnection agreements in good faith (Section 251(c)(1), as applied by Commission rule to all LECs, not just ILECs).
- Resale: the duty to allow other carriers to resell Qwest's services without unreasonable or discriminatory conditions or limitations (Section 251(b)(1)).
- Number portability: the duty to allow customers to port their numbers to another carrier if they choose that carrier as their local exchange carrier (Section 251(b)(2)).
- Dialing parity: the duty to provide dialing parity for other carriers and their customers (Section 251(b)(3)).
- Access to rights of way: the duty to provide other carriers with access to Qwest's poles, ducts, conduits and rights-of-way at Commission-established rates (Section 251(b)(4)).
- Reciprocal compensation: the duty to exchange telecommunications traffic with other carriers pursuant to the Commission's intercarrier compensation rules (Section 251(b)(5)) and 252(d)(2)).
- Tariffs: the duty to file access tariffs consistent with the Commission's rules pertaining to non-dominant carrier access tariffs (Part 61 of the Commission's Rules).
- Just and reasonable pricing and non-discrimination in the provision of interstate services (Sections 201-202).
- Infrastructure sharing: the duty to share infrastructure with eligible carriers (Section 259).
- Special access services remain available at tariffed rates.
- Building access rules (Section 64.2500 of the Commission's Rules).
- All Nebraska State rules governing intrastate services.

In addition, Qwest will continue to offer its market-focused products to other carriers. For example, the Qwest Platform Plus product has been available for a year, and provides carriers with a market substitute to the Commission's regulatory UNE-P product (which, because it was a below-cost offering, was difficult to sustain). Qwest not only continues to offer its high capacity transport products pursuant to tariff (and will, of course, continue to do so after grant of

its petition); Qwest has a powerful economic and market incentive to provide these products.<sup>2</sup> Competition in Omaha is so intense that Qwest does not have the option, even if so motivated, to engage in irrational economic behavior. It must seek to maximize the use of Qwest's own network because of economic necessity, not regulatory necessity.

In other words, Qwest will quite clearly continue to provide services, including interconnection services to competing carriers, after grant of its forbearance petition. It is not realistic to assume that Qwest will forsake both its remaining regulatory obligations and its market opportunities and necessities in providing service after grant of its petition. It would be arbitrary and capricious to deny the forbearance petition on the ground of such incorrect speculation.

## **II. Section 251(c) of the Act has been “fully implemented” by Qwest in the Omaha MSA.**

The second question addressed in this memorandum is whether the Commission can lawfully grant Qwest's forbearance petition because of the limitation in Section 10(d) of the Communications Act, which provides that a petition seeking forbearance from Sections 251(c) and 271 of the Act cannot be granted until after the Commission “determines that those requirements have been fully implemented.”<sup>3</sup>

Section 271 of the Act is the section that outlines what Regional Bell Operating Companies (“RBOCs”) such as Qwest needed to do in order to obtain interLATA authority. Qwest obtained interLATA authority in Nebraska by order released on December 23, 2002.<sup>4</sup> In order to obtain this relief, Qwest was required to demonstrate compliance with the checklist requirements of Section 271(c) of the Communications Act, which it did. Based on this and similar orders, Qwest and other RBOCs ultimately received interLATA authority throughout the United States.

Part of the Section 271 checklist for this process was the requirement that certain loops, transport and switching facilities and functions be unbundled.<sup>5</sup> Thus, these elements must be unbundled under Section 271(c)(1) irrespective of whether they are required to be unbundled as

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<sup>2</sup> The Commission has previously recognized that competitive market forces provide a powerful economic incentive to an ILEC to seek to maximize the use of its network through wholesale marketing. *See In the Matters of Petition for Forbearance of the Verizon Telephone Companies, et al. Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21508-09 ¶ 26 (2004) (“*Verizon Forbearance Order*”).

<sup>3</sup> 47 U.S.C. § 160(d).

<sup>4</sup> *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, Inter-LATA Services in the States of Colorado, et al.*, Memorandum Opinion and Order, 17 FCC Rcd 26303 (2002) (“*Qwest InterLATA Order*”).

<sup>5</sup> *See* 47 U.S.C. § 271(c)(2)(B)(iv),(v),(vi) and (x).

network elements under Section 251(c)(3) of the Act (although not at TELRIC prices).<sup>6</sup> Similarly, the requirement that resale be made available under the pricing principles of Section 252(d)(3) of the Act is an integral part of the same checklist.<sup>7</sup>

After the Commission's *Triennial Review Order* removed certain broadband elements from the list of Section 251(c)(3) unbundled network elements, the RBOCs filed forbearance petitions with the Commission in which they sought relief from the unbundling requirements of Section 271(c) for those elements.<sup>8</sup> In considering those petitions, the Commission was required to examine the issue of whether those Section 271(c) provisions had been "fully implemented," at least in the case of Section 271 authorizations that relied on Section 271(d)(3)(A)(i) of the Communications Act. Unless this was the case, the RBOC's forbearance petitions were legally defective under Section 10(d) of the statute, and the Commission would have been powerless to grant them.<sup>9</sup>

The Commission granted the forbearance petitions, and specifically determined that the "checklist requirements of section 271(c) [of the Communications Act] are 'fully implemented' for purposes of section 10(d) throughout the United States."<sup>10</sup> The Commission determined that there was "nothing further the Commission or the BOC needs to do in order to implement the checklist."<sup>11</sup> After finding the phrase "fully implemented" used elsewhere in the Communications Act, including Section 271(d)(3)(A)(i), which requires an affirmative finding that a BOC "has fully implemented the competitive checklist in subsection (c)(2)(B)," the Commission concluded that "the most logical interpretation [is] that the words 'fully implemented' would have the same meaning when used in section 271, as when referring to section 10(d)'s requirement that section 271 be 'fully implemented' prior to forbearance."<sup>12</sup> Because Qwest's Section 271 application complied with the requirements of Section

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<sup>6</sup> See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3904-06 ¶¶ 465-73 (1999).

<sup>7</sup> 47 U.S.C. § 271(c)(2)(B)(xiv).

<sup>8</sup> See *Verizon Forbearance Order*, 19 FCC Rcd at 21497 ¶ 2.

<sup>9</sup> See 47 U.S.C. § 160(d) ("Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.").

<sup>10</sup> See *Verizon Forbearance Order*, 19 FCC Rcd at 21503 ¶ 15.

<sup>11</sup> *Id.* at ¶ 16.

<sup>12</sup> *Id.*

271(d)(3)(A)(i),<sup>13</sup> Qwest was granted forbearance from Section 271(c) unbundling, along with the other filing RBOCs.

Qwest is now seeking forbearance, among other things, from Sections 251(c)(2), (3), (4) and (6) and 252(d)(1) and (d)(3) of the Communications Act in the Omaha, Nebraska Metropolitan Statistical Area. The question presented is whether the Commission can grant this petition without violating Section 10(d)'s requirement that forbearance from these statutory requirements cannot be granted until after the sections themselves have been "fully implemented."

The statutory structure is such that a slightly different analysis is appropriate in the case of Section 251(c) forbearance than was the case in dealing with Section 271(c), although the two are obviously inextricably intertwined.

Qwest first submits that the Commission's previous *Qwest InterLATA Order* is definitive on whether Qwest is in compliance with the checklist items. The statute requires such "full implement[ation]," and the Commission expressly complied with the Act in this regard.<sup>14</sup> To the extent that the checklist items overlap directly with Section 251(c)(2) and (3) of the Act, as is the case with checklist items (i) (ii), and (xiv), where this overlap is direct and complete, the Commission's express finding of compliance with these checklist items is dispositive.<sup>15</sup> Because the Commission, as a matter of law and as a matter of actual decision, found that Qwest has fully implemented Sections 251(c)(2), (3) and (4), Qwest's petition is in full compliance with Section 10(d) and no further analysis is necessary.

Because the Communications Act itself required a finding of full implementation of Sections 251(c)(2), (3) and (4) prior to grant of Qwest's Section 271 petition in Nebraska, and such a finding was made, the Commission need not look further, and can grant the Qwest petition on these matters without further findings.

Collocation presents a slightly different issue, because collocation, while in the Communications Act as Section 251(c)(6), is not directly part of the checklist. Nevertheless, the Commission has routinely treated collocation and collocation pricing as integral parts of its interconnection analysis under checklist Item 1 (Section 271(c)(2)(B)(i)).<sup>16</sup> Thus, Qwest

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<sup>13</sup> See *Qwest InterLATA Order*, 17 FCC Rcd at 26314-15 ¶ 21.

<sup>14</sup> See *id.* at 26319-20 ¶ 33, 26473-74 ¶ 312, 26510 ¶ 373, 26514-15 ¶ 379.

<sup>15</sup> See *id.* at 26473-74 ¶ 312 ("Qwest complies with the requirements of [checklist item 1]"), 26319-20 ¶ 33 ("Qwest has satisfied the requirements of checklist item 2."). The same analysis is applicable to resale. The Commission has found that Qwest is providing "telecommunications . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)[,]" and that Qwest's performance "satisfie[d] the requirements of this checklist item." *Id.* at 26510 ¶ 373 (footnotes omitted).

<sup>16</sup> See *Qwest InterLATA Order*, *id.* at 26473-74 ¶ 312, in which it was found that, in concluding that Qwest had met the requirements of checklist item 1, "[i]n reaching this conclusions, we have examined Qwest's

submits that the Commission has also found that Qwest has “fully implemented” Section 251(c)(6) through its lawful and valid collocation policies.

It is important to note here that, while various challenges to the Qwest forbearance petition have been based on the allegation that Qwest had not met Section 10(d)’s requirement that Section 251(c) be “fully implemented,” not a single commenting party ever claimed that Qwest’s collocation policies and practices were in any way non-conformant to the Commission’s collocation rules or Section 251(c)(6) of the Communications Act. Qwest stands ready to describe its collocation practices further, but submits that the record is such that, consistent with the *Qwest InterLATA Order*, Section 251(c)(6) has been fully implemented along with the other Section 251(c) items addressed in Qwest’s forbearance petition.

It is important to note here that Qwest is not claiming that its Section 251(c) obligations automatically go away once Section 271 authority has been granted. To the contrary, the statutory scheme was established solely to prevent BOCs from circumventing the implementation of Sections 251(c) and 271 processes through forbearance. Thus, before the statutory forbearance tests outlined in Sections 10(a) and (b) of the Communications Act are effective and can be used in the case of a rule required by Sections 251(c) or 271, those sections must have first been “fully implemented.” Once they have been fully implemented, the affected BOC can seek forbearance from their requirements on the same basis, and predicated on the same evidentiary showing, as is a forbearance petition filed by any other incumbent LEC. That is the import of Section 10(d). It does not mean (and, of course, does not say) that the Commission is forever barred from exercising its forbearance authority over Sections 251(c) and 271. The Commission has already disposed of that argument in the *Verizon Forbearance Order*.

The same analysis applies to Section 251(c). Once the findings outlined in this memorandum have been made in the context of a Section 271 approval order such as the *Qwest InterLATA Order*, the Commission may, based on a proper record and findings, exercise its Section 10 forbearance authority and forbear from any aspect of Section 251(c) that was covered, directly or indirectly, by the findings and analysis of the order itself.

This is the case with Qwest’s petition. Forbearance is clearly lawful.

### **III. Conclusion.**

Qwest has submitted a petition for forbearance which clearly meets the legal requirements for grant set out in Section 10(a) of the Act: 1) absence of a threat of unjust, unreasonable or unreasonably discriminatory rates or practices; 2) full continued protection of consumers; and 3) an indisputable showing that grant is in the public interest. If the Qwest petition cannot be granted on its terms, then there is a very real risk that Section 10 will no longer provide the Commission with the vibrant deregulatory mandate which Congress so clearly intended.

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performance in providing collocation and interconnection trunks to competing carriers, as we have done in prior section 271 proceedings” (footnote omitted).